

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON**

ANDRE WILSON,

Plaintiff,

v.

Case No. 2:11-cv-00103

**STEVE CAUDILL,
TERRY COLEMAN,
DAVID BALLARD,
DON SLACK,
JIM RUBENSTEIN, Commissioner,
CO II JOE LITTLE,
CPL. OFFICER RICK JONES,
SGT. DAVID TONEY,
CO I WESTON TONEY,
CO II BRIAN DEBOARD, and
CO II MICHAEL SHAFFER,**

Defendants.

PROPOSED FINDINGS AND RECOMMENDATIONS

On January 11, 2012, the undersigned conducted an evidentiary hearing at which the plaintiff and defendants Terry Coleman and Sgt. David Toney appeared in person and by counsel and testified. The remaining defendants were represented by counsel. A video of the incident giving rise to this action was reviewed. At the conclusion of the hearing, the undersigned reviewed the roles of the various defendants and all pending motions. The plaintiff and the attorneys agreed that it would be appropriate for the undersigned to file an abbreviated document, referring to the rulings and reasons given on the record.

Accordingly, the undersigned proposes that the presiding District Judge **FIND** that there is a genuine issue of material fact as to whether defendants Joe Little and David Toney used excessive force against the plaintiff, and **RECOMMENDS** that the presiding District Judge **RULE** as follows:

1. ECF No. 36, motion to dismiss [**DENY**] or, in the alternative, motion for summary judgment [**GRANT**] filed by defendants Ballard, Caudill and Rubenstein;
2. ECF No. 58, motion to issue scheduling order filed by the plaintiff [**DENY WITHOUT PREJUDICE**];
3. ECF No. 59, motion to dismiss Second Amended Complaint, filed by defendants Ballard, Caudill and Rubenstein [**DENY AS MOOT**];
4. ECF No. 68, motion for appointment of counsel, filed by the plaintiff [**to be decided by Chief Judge Goodwin**];
5. ECF No. 69, motion to dismiss Second Amended Complaint, filed by defendant Don Slack [**GRANT**];
6. ECF No. 71, motion for appointment of counsel, filed by the plaintiff [**to be decided by Chief Judge Goodwin**];
7. ECF No. 72, motion to dismiss or, in the alternative, motion for summary judgment, filed by defendant Joe Little [**DENY**]; and
8. ECF No. 74, motion for summary judgment filed by defendants Terry Coleman and Rick Jones [**GRANT**].

By Order entered November 22, 2011 (ECF No. 91), the undersigned vacated a prior Order (ECF No. 55) with respect to certain defendants. With the plaintiff's agreement, it is further **RECOMMENDED** that this action as to defendants Michael Shaffer, Brian Deboard and Weston Toney be dismissed with prejudice.

At the conclusion of the hearing, the undersigned indicated that the case would go forward against only defendants Joe Little and David Toney on the plaintiff's claim that they used excessive force on him. The parties discussed the possibility of settlement. In the event that this action is not settled by **January 27, 2012**, the Division of Corrections defendants shall produce to the plaintiff a true copy of the investigation report prepared as to this incident, redacting personal information of the correctional officers. The plaintiff agreed not to disseminate the report within the institution.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable Joseph R. Goodwin, Chief United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and three days (mailing) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to Chief Judge Goodwin.

The Clerk is directed to file this Proposed Findings and Recommendation, to mail a copy of the same to the plaintiff, and to transmit it to counsel of record.

January 11, 2012


Mary E. Stanley
United States Magistrate Judge